Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION - U.S.A. AND KAJIMA ENGINEERING AND CONSTRUCTION, INC., PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit erred by rewriting the sovereign immunity provision of the WMATA Compact, an interstate Compact ratified by Congress pursuant to the Compact Clause, Art. I, § 10, cl. 3, to replace the governmental/proprietary distinction expressly set forth in that Compact with the concededly different discretionary/ministerial distinction set forth in the Federal Tort Claims Act.

2. Whether, in applying the discretionary/ministerial distinction, the D.C. Circuit erred by holding that WMATA has the "discretion" to commit fraud by withholding material information from its contractors, and that the exercise of such "discretion" is "grounded in economic, social, or political policy."

RULE 29.6 STATEMENT

Petitioner KiSKA Construction Corporation-U.S.A., a Delaware corporation, is wholly owned by KiSKA Developers, Inc., also a Delaware corporation, which in turn is wholly owned by Cannes Properties, Inc., a Cayman Islands corporation. No publicly held company holds a 10 percent or greater ownership interest in KiSKA Construction Corporation-U.S.A.

Petitioner Kajima Engineering and Construction, Inc., a California corporation, is wholly owned by Kajima Corp.-Japan, a publicly traded Japanese corporation. No other publicly held company holds a 10 percent or greater ownership interest in Kajima Engineering and Construction, Inc.

Petitioner KiSKA-Kajima is a joint venture of KiSKA Construction Corp.-U.S.A. and Kajima Engineering and Construction, Inc. No publicly held company holds a 10 percent or greater ownership interest in KiSKA-Kajima.

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INTRODUCTION

This case presents the question whether respondent Washington Metropolitan Area Transit Authority ("WMATA") is free to defraud its contractors with impunity by withholding material information regarding the difficulty of performing a construction contract to induce artificially low lump-sum bids. That question is answered in the negative by the WMATA Compact among the District of Columbia, Maryland, and Virginia, which created WMATA and was duly ratified by Congress in 1966 pursuant to the Compact Clause of the Constitution, Art. I, § 10, cl. 3. Section 80 of the Compact waives WMATA's sovereign immunity for torts "committed in the conduct of any proprietary function," but not for torts "occurring in the performance of a governmental function." Because withholding material information about a construction project to induce a contractor to submit a lump-sum bid far below any reasonable cost of performance is not remotely "governmental" in nature, one would think this would be an easy case for denying immunity.

The courts below, however, never even addressed this issue, because the D.C. Circuit in *Sanders v. WMATA*, 819 F.2d 1151 (1987), effectively rewrote Section 80 of the WMATA Compact to replace the textual governmental/proprietary distinction with the distinct discretionary/ministerial distinction of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a). Whatever the relative merits of those two distinctions, there is no question that they are different. Indeed, that is the precise holding of this Court's seminal decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), which squarely rejected an attempt to interpret the FTCA's discretionary/ministerial distinction by reference to the common-law governmental/proprietary distinction. What the D.C. Circuit did, plain and simple, was to rewrite the sovereign immunity provision of the WMATA Compact.

The court thereby violated the most fundamental tenets not only of federalism (since an interstate Compact is a contract among sovereign States) but also of separation of powers (since an interstate Compact is ratified by Congress). If there is any principle that is settled with respect to the Compact Clause, it is that federal courts must respect an interstate Compact's "express terms" and "are not free to rewrite it." *Texas v. New Mexico*, 462 U.S. 554, 564-65 (1983) (Brennan, J.). Because the D.C. Circuit manifestly violated this principle, because the interpretation of an interstate Compact is the solemn "function and duty of the Supreme Court of the Nation," *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), and because the Fourth Circuit (the only other circuit likely to hear claims against WMATA) has (over a vigorous dissent) now decided to follow the D.C. Circuit on this point, *see Smith v. WMATA*, 290 F.3d 201 (2002), this Court's review is necessary and appropriate.

Indeed, wholly apart from the D.C. Circuit's manifest disregard for the plain language of the WMATA Compact, the decision below also warrants review for its startling application of the FTCA's discretionary/ministerial distinction. According to the D.C. Circuit, WMATA not only has the "discretion" to commit fraud by withholding material information from its contractors, but the exercise of such "discretion" is "grounded in economic, social, or political policy." Merely to state those points is to refute them. Under a Nation governed by the rule of law, government agencies do not have the "discretion" to commit fraud, and even if they did, the exercise of such "discretion" could not possibly be deemed a legitimate "policy" choice.

At the end of the day, it is impossible to overstate the radical nature of the decision below. The D.C. Circuit has given WMATA *carte blanche* to commit fraud with impunity. In an era when public trust of government is at a low ebb, it is hard to imagine a more perverse ruling. The courts may not always be

perfect instruments of justice, but neither should they affirmatively be transformed into instruments of injustice. Because the decision below is not even arguably rooted in the text of the WMATA Compact, and creates an incentive for governmental abuse, this Court should grant *certiorari* and reverse the judgment.

OPINIONS BELOW

The D.C. Circuit's decision is reported at 321 F.3d 1151 and reprinted in the Appendix ("App.") at 1a-22a. The district court's unpublished order granting respondent's motion to dismiss petitioners' tort claims is reprinted at App. 23a-29a.

JURISDICTION

The D.C. Circuit issued its decision on March 11, 2003. App. 1a. The Chief Justice granted an extension of the time for filing this petition to and including July 9, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Compact Clause of the Constitution provides:

> No State shall, without the Consent of the Congress, ... enter into any Agreement or Compact with another State.

U.S. Const. Art. I, § 10, cl. 3.

Section 80 of the WMATA Compact provides in pertinent part:

> Liability for Contracts and Torts
>
> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any

> torts occurring in the performance of a governmental function.

WMATA Compact, *codified at* D.C. Code § 9-1107.01(80); Va. Code Ann. § 56-529(80); Md. Code Ann., Transp. § 10-204(80).

STATEMENT OF THE CASE

This case arises out of a project to build a subway tunnel for the Green Line under 14th Street in Washington, D.C.[1] In evaluating that project in the fall of 1992, respondent WMATA commissioned an outside technical expert, GZA GeoEnvironmental, Inc. ("GZA"), to prepare a Tunnel Alternative Report ("TAR") to analyze the subsurface conditions in the project area and recommend an appropriate tunneling method. App. 34a. In November 1992 and January 1993, GZA prepared two TARs for the 14th Street tunnel project that concluded—among other things—that the soil in the project area could not effectively be dewatered, and hence required the use of certain specialized (and expensive) tunneling machinery. App. 36a-40a.

In particular, the first TAR reported that "[g]roundwater for most of the [tunnel] alignment is anticipated to be above the crown [top of the tunnel] with the exception of the last few hundred feet where the groundwater will probably be approximately at spring line [the tunnel' s midpoint]," and that, in light of these soil conditions, "even ... fairly extensive dewatering" was not likely to be "[e]ffective." App. 37a. The second TAR was, if anything, even more emphatic on this score, insisting that "[w]e do not believe the majority of the soils along this alignment can be effectively dewatered ....

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[1] Because the district court dismissed petitioners' tort claims on the pleadings, the factual allegations of the complaint must be accepted as true, *see Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 n.1 (2002)—a point that the D.C. Circuit expressly acknowledged, *see* App. 8a & n.7.

Dewatering, if attempted, would, in our opinion, be costly and probably ineffective." App. 39a.

Notwithstanding these recommendations by its own experts, WMATA wanted to use a faster and less expensive tunneling method than GZA recommended, because otherwise the bids would be too high for WMATA to afford the project. Accordingly, after reviewing the second TAR, WMATA's Board of Engineers met with GZA. App. 40a. At WMATA's insistence, GZA thereafter issued a third TAR, which authorized the use of less expensive tunneling machinery, but cautioned that "[e]xtensive dewatering will be an essential element" of using such machinery. App. 40a-41a. And GZA still expressed reservations about the feasibility of that option, emphasizing that "effective dewatering of the alignment is *at best* going to be difficult," and should be attempted only in conjunction with an "extensive" soil stabilization program. App. 41a-42a (emphasis added). Indeed, in a startling (and telling) departure from industry practice, GZA insisted that WMATA agree to hold GZA harmless if the dewatering system dictated by WMATA proved insufficient. *See* D.C. Cir. App. 590.

WMATA thus knew, months before soliciting bids on the project, that an extensive dewatering and soil stabilization plan was going to be necessary on the project. App. 43a. Accordingly, WMATA directed GZA to design a dewatering system that would "absolutely" lower the groundwater table in the project area, and GZA produced a design consisting of approximately 319 dewatering wells. App. 48a; *see also* D.C. Cir. App. 1045-46. GZA also advised WMATA to give the contractor exclusive control over the design and implementation of a soil stabilization plan. App. 51a. In light of the wet soil in the project area, WMATA's design consultants estimated that approximately 400,000 cubic feet of pre-support chemical grout would be necessary. App. 53a.

On December 6, 1993, WMATA issued an Invitation For Bids ("IFB") on the 14th Street tu el project. App. 32a. The contract documents, including the I 3, set forth detailed design specifications, and required bidders to submit lump-sum bids for carrying out the job *based on those specifications*. App. 32a-33a.[2] The design specified in the contract documents, including the IFB, however, deviated materially from GZA's recommendations. In particular, the design cut far back on the dewatering program recommended by GZA—it provided for only 61 dewatering wells (about *one quarter* the recommended number), and only 110,000 cubic feet of pre-support chemical grouting (again, about o*ne quarter* the recommended amount). App. 46a-48a, 53a-54a.

Based on the GZA reports and GZA's insistence on a hold-harmless provision, WMATA thus knew that its design specifications were inadequate to get the job done. Nonetheless, WMATA adopted those defective specifications to induce contractors to submit binding lump-sum bids for far less than the actual cost of performance—in effect, deceiving its bidders into subsidizing the project. To accomplish this scheme, WMATA actively concealed from the bidders its knowledge that its design specifications were inadequate to dewater and stabilize the soil for effective tunneling. In particular, *WMATA concealed all of GZA's reports on subsurface conditions at the project site, as well as GZA's related recommendations*. App. 35a, 48a, 53a-54a. At the same time, WMATA selectively included much older and obsolete reports on subsurface conditions in the project area, thereby creating a false impression—squarely inconsistent with the GZA reports and reality—that the defective design specifications could get the job done. WMATA falsely stated

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[2] "A design specification describes in precise detail the materials to be employed and the manner in which the construction work is to be performed." App. 4a n.4 (citing *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1357 (Fed. Cir. 2002)).

that these reports were being provided "in order that the contractor may have the *same information as is available to [WMATA]*." App. 34a-35a (emphasis added).

In reliance on WMATA's incomplete and misleading information, petitioners KiSKA Construction Corporation-U.S.A. and Kajima Engineering and Construction, Inc., partners in a joint venture, KiSKA-Kajima (collectively "KiSKA") submitted a lump-sum bid on the project for $42,905,000. App. 33a, 55a. After finding that KiSKA was the lowest responsive and responsible bidder, WMATA accepted that bid, and, in early 1994, the two parties signed a contract. App. 33a. Thereafter, KiSKA had no choice but to perform the contract pursuant to WMATA's detailed design specifications. App. 55a.

KiSKA made every reasonable effort to implement WMATA's prescribed dewatering system, retaining an experienced dewatering subcontractor, initiating dewatering processes as quickly as possible and months before the planned start of tunnel excavation, monitoring groundwater tables, and informing WMATA of the results of that monitoring. App. 55a-56a. Nevertheless, just as GZA had predicted, WMATA's limited dewatering and soil stabilization design failed to lower the groundwater table sufficiently for tunneling with the specified machinery. App. 56a. The project was thus a fiasco as KiSKA encountered substantial amounts of water in the tunnel—with groundwater infiltrating the tunnel at rates as fast as 50 gallons per minute—causing the specified machinery to malfunction and KiSKA to incur substantial delay, disruption, safety risks, and financial harm. App. 58a-60a. Indeed, the soil remained so saturated, muddy, and unstable that use of the contractually specified machinery became futile and KiSKA was often forced to excavate the tunnel *by hand*. App. 59a.

KiSKA eventually completed the project at a cost of almost *double* its $43 million lump-sum bid. App. 67a. Although WMATA accepted all work under the contract, and today the

Green Line runs through KiSKA's tunnel, WMATA refused to pay KiSKA for the tens of millions of dollars in losses caused by WMATA's tortious inducement of KiSKA to submit an artificially low bid on the contract, and its subsequent breach of that contract.

Accordingly, KiSKA brought this lawsuit. The complaint contains five counts: (I) Fraudulent Misrepresentation/ Fraudulent Inducement of Contract, App. 63a-67a; (II) Negligent Misrepresentation, App. 67a-68a; (III) Unilateral Mistake, App. 68a-70a; (IV) Material Breach of Contract, App. 70a-72a; and (V) Work Outside the Scope of the Contract - Quantum Meruit, App. 72a-73a.

The district court (Kollar-Kotelly, J.) dismissed KiSKA's tort claims, Counts I and II, for failure to state a claim on which relief could be granted. App. 23a-29a. As the court explained, in applying the immunity provision of the WMATA Compact, "the D.C. Circuit draws upon the Federal Tort Claims Act's dichotomy between 'discretionary' and 'ministerial' acts." App. 26a. Applying this analysis, the court concluded that the conduct challenged in KiSKA's tort claims—*i.e.*, tortious misrepresentation and/or concealment of material information—was "'susceptible to policy judgment,' and therefore immune from judicial review, because [such conduct] involve[s] planning and design rather than implementation or operation." App. 27a.

The case thus went to trial on KiSKA's contract claims only, and the jury returned a verdict for WMATA. The district court subsequently entered final judgment in WMATA's favor on all counts of the complaint.

The D.C. Circuit affirmed. App. 1a-22a. The court began by explaining that "[b]ecause the distinction between proprietary and governmental functions has created a quagmire that has long plagued the law of municipal corporations, we have interpreted section 80 [of the WMATA Compact] as

incorporating the distinction between discretionary and ministerial functions, a dichotomy set forth in the [FTCA]." App. 10a (internal quotations and citations omitted). That dichotomy, the court stated, required analysis of two issues: (1) "whether any statute, regulation, or policy specifically prescribes a course of action for an employee to follow," and (2) "whether the exercise of discretion is grounded in social, economic, or political goals," App. 10a-11a (internal quotations and citations omitted).

Applying this analysis, the D.C. Circuit first held that "WMATA's discretion to select a particular project design encompass[es] the discretion to determine *the content of that project's bid package*." App. 11a (emphasis added). In other words, because WMATA had "discretion" to design the subway tunnels, it had "discretion" to conceal material information to induce lump-sum bids on which its contractors would necessarily lose money. The covenant of good faith and fair dealing did not limit such "discretion," the court declared, because that is a contract, not a tort, doctrine, and KiSKA failed to identify any statute, regulation, or policy specifically prohibiting WMATA from committing fraud on its contractors. App. 12a-13a.

The D.C. Circuit then held that "WMATA's discretionary decision to exclude certain design documents from the tunnel project's bid package is susceptible to policy judgment." App. 15a (internal quotation and citation omitted). That is so, the court stated, because "WMATA's decision required consideration of budgetary constraints and economic expediency," namely "packaging, duplication and distribution costs" as well as the risk of "releas[ing] unreliable or mistaken reports." *Id.* The complaint, of course, specifically alleged that the concealed information had been accurate, and had been concealed precisely to trick contractors into submitting artificially low lump-sum bids for the job. *See* App. 44a-61a, 63a-68a.

Accordingly, the D.C. Circuit affirmed the district court's dismissal of KiSKA's tort claims on the pleadings under section 80 of the WMATA Compact. App. 16a. The D.C. Circuit then proceeded to affirm the district court's rulings on KiSKA's contract claims as well, and thus to affirm the judgment in WMATA's favor on all grounds. App. 22a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit Erred By Replacing The Governmental/Proprietary Distinction In The WMATA Compact With The Discretionary/Ministerial Distinction In The Federal Tort Claims Act.

The D.C. Circuit erred, first and foremost, by analyzing WMATA's asserted immunity from KiSKA's tort claims under the FTCA's discretionary/ministerial distinction rather than the WMATA Compact's distinct governmental/proprietary distinction. An interstate Compact is not a hortatory declaration; rather, it is a binding contract between sovereign States that is also ratified by Congress under the Constitution's Compact Clause, Art. I, § 10, cl. 3. Courts are therefore not free to rewrite the terms of an interstate Compact just because they think those terms are difficult to apply; rather, "unless the compact to which Congress has consented is somehow unconstitutional," it must be applied by the courts according to its "express terms." *Texas,* 462 U.S. at 564-65. The D.C. Circuit did not even purport to do that here.

The WMATA Compact was negotiated and signed by the District of Columbia, Maryland, and Virginia, to create a regional authority that would, among other things, build and operate a mass transit system. Congress, pursuant to its authority under the Compact Clause, Art. I, § 10, cl. 3 (as well as its constitutional authority over the District of Columbia, *see* Art. I, § 8, cl. 17) ratified the Compact in November 1966. *See* WMATA Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966).

Thus, although the WMATA Compact is part of the law of the District of Columbia, *see* D.C. Code § 9-1107.01; Maryland, *see* Md. Code Ann., Transp. § 10-204, and Virginia, *see* Va. Code Ann. § 56-529, it is also "a law of the United States," *Cuyler v. Adams*, 449 U.S. 433, 438-40 (1980), and its interpretation presents a federal question, *see id.; see also New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas*, 462 U.S. at 564; *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959); *West Virginia*, 341 U.S. at 28; *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 695 (1925) ("Congress ... exercise[s] *national* supervision [over interstate Compacts] through its power to grant or withhold consent, or to grant it under appropriate conditions.") (emphasis added).

Section 80 of the WMATA Compact expressly waives WMATA's sovereign immunity for torts "committed in the conduct of any proprietary function," but not for torts "occurring in the performance of a governmental function." D.C. Code § 9-1107.01(80); Va. Code Ann. § 56-529(80); Md. Code Ann., Transp. § 10-204(80). The Compact did not create this distinction out of whole cloth; rather, the distinction has an ancient pedigree in the common law of municipal liability. *See, e.g.*, 18 Eugene McQuillin, *The Law of Municipal Corporations* §§ 53.02.10, 53.23 (3d ed. 2003). Courts across the country have long applied, and continue to apply, that distinction. *See, e.g., Wojcik v. Massachusetts State Lottery Comm'n*, 300 F.3d 92, 99 (1st Cir. 2002) (noting that in determining whether an entity is an 'arm of the state' entitled to immunity, the court analyzes, among other things, "whether the agency's function is governmental or proprietary"); *City of Gastonia v. Balfour Beatty Constr. Corp.*, 222 F. Supp. 2d 771, 774 (W.D.N.C. 2002) (applying governmental/proprietary distinction and

holding that city's conduct of business relationships with contractors and subcontractors is proprietary); *City of Pontiac v. Consumers Power Co.*, 300 N.W.2d 594, 596 (Mich. Ct. App. 1981) (applying governmental/proprietary distinction and holding that city's construction of public hospital is proprietary); *Wygonski v. Medina Cty. Agric. Soc'y*, 785 N.E.2d 831, 836-37 (Ohio Ct. Com. Pl. 2002) (applying governmental/proprietary distinction and holding that provision of water to county fair concessionaires is a proprietary function); *Harrell v. City of Norfolk*, 578 S.E.2d 756, 757-58 (Va. 2003) (applying governmental/proprietary distinction and holding that city's maintenance of cross-walk is governmental); *see also Owen v. City of Independence*, 445 U.S. 622, 681 (1980) (Powell, J., dissenting) (noting that a number of States retain governmental/proprietary distinction for municipal liability).

Indeed, ironically enough, this Court has expressly *rejected* an attempt to interpret the FTCA's textual discretionary/ministerial distinction by reference to the traditional governmental/proprietary distinction. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955). As the Court explained, the FTCA (enacted in 1946) "was the product of nearly thirty years of congressional consideration" and "the language of the statute does not support the Government's argument" that the textual discretionary/ministerial distinction was meant to codify the common-law governmental/proprietary distinction. *Id.* at 68. Writing for the Court, Justice Frankfurter minced no words in criticizing the latter distinction, which he described as a "quagmire that has long plagued the law of municipal corporations." *Id.* at 65.

It was thus eminently clear in 1966—when the District of Columbia, Maryland, and Virginia negotiated and signed, and Congress ratified, the WMATA Compact—that the Compact's governmental/proprietary distinction was distinct from the FTCA's discretionary/ministerial distinction. And that point

remained just as clear after 1966. *See, e.g., Owen*, 445 U.S. at 644-50 (distinguishing between governmental/proprietary and discretionary/ministerial tests for municipal liability); *Spencer v. General Hosp.*, 425 F.2d 479, 484 (D.C. Cir. 1969) (*en banc*) (overruling circuit precedent and replacing common-law governmental/proprietary standard for governmental liability in the District of Columbia with the FTCA's discretionary/ministerial standard, and distinguishing between the two standards). It necessarily follows that there is no basis for courts to construe these two textually and historically different distinctions to be one and the same. It is a fundamental tenet of contract law that parties to a contract (like the entities that signed the WMATA Compact) are deemed to have acted by reference to existing legal precepts. *See, e.g., Norfolk & W. Ry. Co. v. Train Dispatchers Ass'n*, 499 U.S. 117, 129-30 (1991); *see generally* 11 Richard A. Lord, *Williston on Contracts* § 30:19 (4th ed. 1999). And it is equally well settled that Congress acts against the background of prior judicial decisions. *See, e.g., Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998). If the framers of the WMATA Compact wanted to adopt the discretionary/ministerial distinction to govern WMATA's sovereign immunity, they could and would have done so. *See, e.g., Texas*, 462 U.S. at 565 ("The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it."). No one in 1966 could reasonably have thought that the governmental/proprietary distinction expressly set forth in the WMATA Compact was a reference to the discretionary/ministerial distinction expressly set forth in the FTCA.

And for more than twenty years, no court applying Section 80 of the WMATA Compact suggested any such thing. To the contrary, the D.C. Circuit, the Fourth Circuit, and the D.C. Court of Appeals all applied the traditional governmental/proprietary distinction. *See, e.g., Morris v.*

WMATA, 781 F.2d 218, 220 (D.C. Cir. 1986); *Martin v. WMATA*, 667 F.2d 435, 436 (4th Cir. 1981) (*per curiam*); *Hall v. WMATA*, 468 A.2d 970, 972 (D.C. 1983). Indeed, the D.C. Court of Appeals in *Hall* expressly *rejected* an invitation to abandon the WMATA Compact's governmental/proprietary distinction in favor of the FTCA's discretionary/ministerial distinction. *See id.* As the court explained, "Section 80 is clear in that it establishes the 'governmental-proprietary' analysis to determine if tort immunity is applicable," and "ours is not the province to rewrite a provision that is, at once, a statute and a contract among sovereigns." *Id.*

All that changed, however, in 1987, when the D.C. Circuit announced in *Sanders* that "[i]n granting immunity from tort actions to WMATA's 'governmental' functions, the Compact seems to us to have accepted" the FTCA's discretionary/ministerial distinction. 819 F.2d at 1155. "The parallel is apparent," the court declared, because both the FTCA and the WMATA Compact sought to limit the waiver of governmental immunity for certain torts. *Id.* In a footnote, the court "recognize[d]" that the "Federal Tort Claims Act test and the 'governmental-proprietary' test are viewed as distinct and not necessarily coterminous," but asserted that "the 'discretionary function' standard is *at least a subset* of 'governmental functions.'" *Id.* at 1155 n.9 (emphasis added).

That critical assertion is manifestly incorrect. While *some* discretionary activities may be governmental in nature, it is simply not true that *all* discretionary activities are governmental in nature. To the contrary, a whole host of discretionary activities are proprietary in nature, since private parties no less than the government exercise discretion. *See, e.g., United Artists Theatre Co. v. Walton*, 315 F.3d 217, 233 (3d Cir. 2003) (noting that in the corporate law context, the business judgment rule cautions courts from interfering with the discretion of corporate directors and that the corporate director's job consists in part of "decision-making—*i.e.*, the making of economic

choices and the weighing of the potential of risk against the potential of reward"); *Great Rivers Co-op. of Southeastern Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 702 (8th Cir. 1999) (noting that the "'business judgment rule' shields a director from liability in the case of good faith decisions *within the director's discretion*") (emphasis added). Indeed, the very authority cited by the D.C. Circuit in *Sanders* for the proposition that discretionary activities are "at least a subset" of governmental activities says no such thing. *See* 819 F.2d at 1155 n.9 ("discretionary function" test "is based on the theory that *some* governmental functions are of a type that should not be subject to review and second-guessing by the courts in a tort decision.") (quoting *Restatement (Second) of Torts* § 895C cmt. g (1979)) (emphasis added). Not all discretionary decisions are governmental, and not all governmental decisions are discretionary. Thus, as a matter of law and logic, there is no basis for applying the FTCA's discretionary/ministerial distinction as a proxy for the WMATA Compact's governmental/proprietary distinction.

The D.C. Circuit has since sought to justify its importation of the FTCA's discretionary/ministerial distinction into the WMATA Compact by asserting that the governmental/proprietary distinction is "difficult" to apply "with any precision beyond obviously public activities like law enforcement." *Beebe v. WMATA*, 129 F.3d 1283, 1287 (D.C. Cir. 1997); *see also Dant v. District of Columbia*, 829 F.2d 69, 74 (D.C. Cir. 1987) (applying governmental/proprietary distinction would be "a task so difficult, given the state of our society, that it would sometimes invite arbitrary judicial decision"); *Beatty v. WMATA*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (same); *Souders v. WMATA*, 48 F.3d 546, 548-49 (D.C. Cir. 1995) (same); App. 10a (same).

But courts are "not free to rewrite" an interstate Compact because of its perceived shortcomings. *Texas*, 462 U.S. at 564. Indeed, in *New Jersey*, this Court rejected a Special Master's

recommendation to depart from the express terms of an interstate Compact to prevent the boundary between New Jersey and New York from dividing not only Ellis Island "but some of the buildings on it." 523 U.S. at 811. Although the Court "appreciate[d] the difficulties" of applying this boundary line, the Court emphasized that it had no choice but to respect the "express terms" of the Compact, "no matter what the equities of the circumstances might otherwise invite." *Id.*; *see also Texas*, 462 U.S. at 567-68 ("If there is a compact, ... our first and last order of business is interpreting the compact."); *International Union of Operating Eng'rs v. Delaware River Joint Toll Bridge Comm'n*, 311 F.3d 273, 276 (3d Cir. 2002) (citing *Texas* and *New Jersey* for the proposition that courts cannot "rewrite" an interstate Compact's "express terms" even "for reasons of practicality and convenience"). Because the D.C. Circuit has never suggested (and could not reasonably conclude) that the ancient common-law governmental/proprietary distinction adopted by the WMATA Compact is "somehow unconstitutional," *Texas*, 462 U.S. at 564, it has no choice but to apply that distinction in assessing WMATA's claims of sovereign immunity.

In any event, there is irony in the D.C. Circuit's embrace of the FTCA's discretionary/ministerial distinction on judicial administrability grounds, because that distinction itself has proven notably "difficult[]" for the courts to apply. *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring in the judgment). This very case proves the point. The D.C. Circuit held that withholding material information to induce a contractor to submit an artificially low lump-sum bid for a construction project was a "discretionary" act grounded in "policy" considerations. App. 11a-16a. Whatever the merits of that holding (and, as noted in Section II below, petitioners believe it is manifestly incorrect), even the D.C. Circuit conceded that it "present[ed] a closer question than those decided in cases past." App. 15a.

Applying the WMATA Compact's governmental/proprietary distinction, however, this is not even a close call. The function of *entering into* a construction contract is proprietary, even if the government will ultimately use the project to perform a governmental function. *See, e.g., Green Island Contracting Corp. v. New York*, 458 N.Y.S. 2d 828, 833 (N.Y. Ct. Cl. 1983) (noting that the State acted in a proprietary capacity when entering into and terminating contracts for the construction of a state highway); *Ruth v. Blue River Constructors*, 224 F. Supp. 717, 718 (D. Colo. 1963) ("Denver, acting in its proprietary capacity, through its Board of Water Commissioners, had authority to enter into the contract for the construction of the water diversion tunnel known as the Roberts Tunnel."), *cf. Portmann v. United States*, 674 F.2d 1155, 1160-61 (7th Cir. 1982) (noting that "[t]he sovereign/proprietary distinction has proven to be particularly useful in cases involving governmental contracts" and that "essentially commercial transactions involving the purchase or sale of goods *or services*" are proprietary) (emphasis added).

While the WMATA Compact may shield WMATA from liability for tort claims based generally on its design of subway tunnels, the Compact—when properly read—does not shield WMATA from liability for tort claims based on fraud committed in the course of contracting for tunnel construction services. "How [a governmental entity] conducts its business relationships with contractors and subcontractors is not inherently governmental—such a function requires no exercise of governmental discretion. It is a function that could just as easily be exercised (and, in fact, is routinely exercised) by private corporations and individuals." *Gastonia*, 222 F. Supp. 2d at 774 (holding that even though general decisions regarding design and location of a water treatment plant are governmental functions, city's conduct of business relationships with contractors and subcontractors during plant construction was proprietary). The D.C. Circuit's concern over the difficulty

of applying the WMATA Compact's governmental/proprietary distinction, thus, is not only illegitimate but illusory.

Finally, as a practical matter, no further percolation can reasonably be expected on this issue, because the Fourth Circuit (the only other federal circuit likely to hear claims against WMATA) recently "agree[d] with the Court of Appeals for the District of Columbia Circuit" that immunity from tort claims under section 80 of the WMATA Compact must be analyzed "on the basis of the FTCA's legal principles." *Smith v. WMATA*, 290 F.3d 201, 207 (4th Cir. 2002). According to the Fourth Circuit, "a proper consideration in construing the Compact is the maintenance of consistency between the legal interpretations of the two federal circuits most likely to hear cases in which [WMATA] is a party, *i.e.*, this Court and the Court of Appeals for the District of Columbia [*sic*]." *Id.* at 207 n.9 (internal quotation omitted).

Judge Michael vigorously dissented on the ground that "the D.C. Circuit's approach to the governmental function exception [to the waiver of sovereign immunity under the WMATA Compact] is inconsistent with the intent of the Compact's framers and ... any pragmatic considerations supporting that circuit's approach are not strong enough to justify it." *Id.* at 219. "To begin with the most obvious point, surely the Compact's framers would have used the terms 'discretionary' and 'ministerial' in section 80 if they had meant to signal their allegiance" to the FTCA. *Id.* In light of *Indian Towing,* it is implausible to think that the WMATA signatories and Congress meant to adopt the discretionary/ministerial distinction by adopting the governmental/proprietary distinction. *See id.* "It makes far more sense to believe that section 80 was drafted as a compromise between the differing rules of governmental immunity then followed by the Compact's signatories." *Id.* at 220.

Judge Michael recognized that, "because our sister circuit's approach to section 80 appears well-established, the cost of

refusing to follow that approach is to create a circuit split between the only two circuits that are likely to hear tort claims against [WMATA]." *Id.* at 222. Nonetheless, he concluded, "adopting what I regard as a better reading of the [WMATA] Compact is worth the price of creating a circuit split." *Id.* "While I appreciate the practical considerations behind the majority's decision to follow the D.C. Circuit's reading of section 80, the price of intercircuit consistency on this issue is the gutting of the Compact's waiver of sovereign immunity. I believe that price is too high." *Id.*[3]

KiSKA should not be forced to pay that high price here, by being denied its day in court on tort claims under an immunity analysis with no basis in the WMATA Compact. Because the interpretation of an interstate Compact is the solemn "function and duty of the Supreme Court of the Nation," *West Virginia,* 341 U.S. at 28, this Court should not allow the D.C. Circuit's erroneous interpretation of the WMATA Compact to become the definitive law of the land by default.

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[3] Because Section 81 of the WMATA Compact vests original (but not exclusive) jurisdiction over actions by or against WMATA in "[t]he United States District Courts," D.C. Code § 9-1107.01(81); Md. Code Ann., Transp. § 10-204(81); Va. Code Ann. § 56-529(81), WMATA always has the option of litigating in federal court. To date, WMATA has not always exercised that option, and some actions have been litigated in state court. It is worth noting, in this regard, that the D.C. Court of Appeals (in a reversal of its *Hall* precedent) now also has followed the D.C. Circuit in substituting the FTCA's discretionary/ministerial distinction for the WMATA Compact's governmental/proprietary distinction. *See McKethean v. WMATA*, 588 A.2d 708, 712-13 (D.C. 1991). The court's decision to follow federal precedent on this point is not surprising, given that "[w]hether an activity is proprietary or governmental is a question of federal law because the WMATA Compact is an Act of Congress." *Id.* at 712. The state courts of Maryland and Virginia do not appear to have addressed this question, but even in the unlikely event that they were to reject the prevailing federal interpretation on this question of federal law, WMATA could always avoid those courts in the future by removing cases presenting sovereign immunity issues (which may explain why the issue has never arisen in those courts in the first place).

II. The D.C. Circuit Erred By Holding That WMATA Has The "Discretion" To Commit Fraud By Concealing Material Information From Its Contractors, And That The Exercise Of Such "Discretion" Is "Grounded In Social, Economic, Or Political Policy."

Wholly apart from the D.C. Circuit's erroneous decision to apply the FTCA's discretionary/ministerial standard to the WMATA Compact in the first place, the court erred in applying that standard by holding that WMATA has the "discretion" to commit fraud by withholding material information from its contractors, and that the exercise of such "discretion" is "grounded in social, economic, or political policy." App. 11a-16a (internal quotation omitted). That holding is antithetical not only to the WMATA Compact, but to the rule of law.

KiSKA's complaint squarely alleges that WMATA engaged in tortious conduct by withholding material information to induce KiSKA to submit a lump-sum bid that WMATA knew was far below the cost of performance. *See* App. 44a-61a, 63a-68a. The D.C. Circuit framed the issue as whether WMATA has the discretion to determine "the contents of the bid package," App. 11a (capitalization modified), but that is really just a polite way of asking whether WMATA has the discretion to commit fraud, since, "in accordance with the law of the applicable signatory," WMATA Compact § 80, D.C. Code § 9-1107.01(80); Va. Code Ann. § 56-529(80); Md. Code Ann., Transp. § 10-204(80), it is undoubtedly fraudulent to withhold material information to induce someone to enter into a contract, *see, e.g., Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 923 (D.C. 1992).

The D.C. Circuit held that WMATA does have such "discretion," on the ground that "*KiSKA* has failed to cite any statute, regulation or policy that 'specifically proscribes' the content of WMATA's [bid packages]." App. 12a (emphasis added). As an initial matter, the court thereby saddled the wrong party with the burden of proof on this point, since it was

WMATA's burden (as the party seeking dismissal for failure to state a claim upon which relief can be granted) to show "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Indeed, even at the *merits* stage, a governmental entity seeking immunity bears the burden of establishing that its challenged conduct was discretionary; the challenging party does not bear the burden of establishing that such conduct was *not* discretionary. *See, e.g., Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992); *Carlyle v. United States*, 674 F.2d 554, 556 (6th Cir. 1982); *Stewart v. United States*, 199 F.2d 520, 522 (7th Cir. 1952). Needless to say, the D.C. Circuit's misallocation of the burden of proof tainted its entire analysis. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) (misallocation of burden of proof impervious to harmless-error review).

Above and beyond this fundamental procedural error, the D.C. Circuit erred by holding that fraud and misrepresentation are within the scope of the "discretion" protected by the FTCA. To the contrary, that statute includes a *separate* exception to the waiver of sovereign immunity for "[a]ny claim arising out of ... misrepresentation, deceit, or interference with contract rights," 28 U.S.C. § 2680(h), distinct from the "discretionary function" exception, *id.* § 2680(a). If such tortious misconduct were within the scope of the government's "discretion," of course, that separate exception would be rendered superfluous, in violation of the axiom that courts must construe statutes so that no provisions are rendered inoperative. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). The WMATA Compact tellingly contains no similar intentional-tort exception to the waiver of sovereign immunity, and the D.C. Circuit erred by effectively adding such an exception by simply including intentional torts among WMATA's "discretionary" functions (and thus within the "discretionary function" exception that the D.C. Circuit had already added to the WMATA Compact). The

D.C. Circuit's only justification for its curious characterization of intentional torts as "discretionary" conduct was that "we have previously upheld the dismissal of fraud and misrepresentation claims against WMATA where the challenged activities involved discretionary decisions." 12a n.11 (citing *Beebe,* 129 F.3d at 1286, 1288, a decision that did not address the FTCA's separate exception for intentional torts).

Indeed, contrary to the counterintuitive holding below, it is well-settled that governmental entities do *not* have the discretion to withhold material information from their contract bidders. Rather, "[w]hen the government agency is in possession of information pertinent to construction work to be performed under a contract, there is a *duty* to fully disclose and furnish to the contractor the facts of which the agency has knowledge." *D. Federico Co. v. New Bedford Redevelopment Auth.*, 723 F.2d 122, 125 (1st Cir. 1983) (emphasis added); *see also Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1371-72 (Ct. Cl. 1972) (same); *Wm. A. Smith Contracting Co. v. United States*, 412 F.2d 1325, 1338 (Ct. Cl. 1969) (same); *J.A. Jones Constr. Co. v. United States*, 390 F.2d 886, 888 (Ct. Cl. 1968) (same).

The D.C. Circuit attempted to sidestep these cases by asserting that they involved a *contract* disclosure duty rather than a *tort* disclosure duty. *See* App. 12a-13a. That is, however, a distinction without a difference: the point remains that WMATA cannot claim that a decision to withhold material information from its bidders represents the kind of discretionary decision that should be insulated from "judicial 'second-guessing.'" *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).[4] To the contrary, the integrity of the bidding process

[4] The fact that claims alleging violations of a disclosure duty by the Federal Government must be redressed through contract, rather than tort, simply reflects the fact, noted above, that the FTCA includes a specific provision preserving sovereign immunity for intentional torts like fraud and

would be wholly undermined if the government were free to conceal and/or misrepresent material information about a project to induce artificially low bids. WMATA's discretion to choose a particular *design* for a project simply does not encompass the discretion to conceal and/or misrepresent material *information* about that project.

KiSKA also noted below that WMATA's decision to withhold material information from bidders on the 14th Street tunneling project violated a Federal Transit Administration ("FTA") Circular specifying that WMATA's contract solicitations must "[i]ncorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured." FTA Circular 4220.1D ("Third Party Contracting Requirements") ¶ 8(c)(1); D.C. Cir. App. 1063. The D.C. Circuit held that this Circular was too general to "constrain WMATA's discretion with respect to the particular documents to include within a bid package." App. 13a. But it is fanciful to think that only a regulation specifically prohibiting WMATA from committing fraud by withholding material information from its contractors would suffice to constrain its discretion in this regard; presumably, no regulation specifically prohibits WMATA from ordering murders, but that hardly brings murder within the agency's "discretion." Again, this is not supposed to be a game for clever lawyers, but a common-sense inquiry into the kind of official conduct that

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misrepresentation. *See* 28 U.S.C. § 2680(h). Cases from States that have waived sovereign immunity for intentional torts like those enumerated in Section 2680(h) specifically recognize a *tort* duty not to conceal and/or misrepresent material information. *See, e.g., City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 340-41 (8th Cir. 1983) (*per curiam*) (applying Missouri law); *P.T.&L. Constr. Co. v. New Jersey*, 531 A.2d 1330, 1339-41 (N.J. 1987); *Earl L. Reamer Co. v. City of Swartz Creek*, 256 N.W.2d 447, 450 (Mich. Ct. App. 1977) (*per curiam*); Gregory G. Sarno, Annotation, *Public Contracts: Duty of Public Authority to Disclose to Contractor Information, Allegedly in its Possession, Affecting Cost or Feasibility of Project*, 86 A.L.R.3d 182, 189-97, 206-13 (1978); *cf. Restatement (Second) of Torts* §§ 550-51 (1977).

should be insulated from "judicial 'second-guessing.'" *Varig Airlines*, 467 U.S. at 814.

In any event, even if there were some basis for concluding that WMATA has the "discretion" to withhold material information from its contractors, it is simply beyond the pale to suggest that the exercise of any such "discretion" is "grounded in social, economic, or political policy." App. 14a (internal quotation omitted); *cf. Varig Airlines,* 467 U.S. at 814 (discretionary function exception protects only choices "grounded in social, economic, [or] political policy"); *Gaubert*, 499 U.S. at 325 n.7 ("There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish."). Whatever else it may be, a decision to withhold information to induce a contractor to submit an artificially low bid on a construction project cannot possibly be deemed a "policy" choice "of the nature and quality that Congress intended to shield from tort liability." *Varig Airlines*, 467 U.S. at 813.

The D.C. Circuit's efforts to avoid this straightforward point do not pass the straight-face test. Again characterizing the challenged conduct as the "decision to exclude certain design documents from the tunnel project's bid package," App. 15a, the court held that this decision "required consideration of budgetary constraints and economic expediency"—specifically, the cost of "packaging, duplication and distribution" and the risk of releasing "unreliable or mistaken reports," *id.* But WMATA *included* in the bid package extensive but obsolete reports from the 1960s and 70s while withholding the more recent and accurate GZA reports. And in any event, the fact that WMATA may have committed fraud to save money does not render such misconduct a legitimate policy choice. *See* Ralph C. Nash & John Cibinic, *Federal Tort Claims Act: License to Commit Fraud*, 17 No. 5 Nash & Cibinic Rep. P. 26

(May 2003) (noting, in light of the decision below, that "[t]he courts evidently believe that it is proper to hide things from prospective contractors if disclosing the information might increase prices," and stating that this "type of money grubbing is not what we should expect from our Government" and "[i]n addition, ... is just stupid."). If the farfetched "policy" considerations articulated by the D.C. Circuit were deemed sufficient to satisfy the discretionary function exception, then that exception would "all but swallow up" the rule, *ARA Leisure Servs. v. United States*, 831 F.2d 193, 196 (9th Cir. 1987), and would defeat the point of waiving sovereign immunity in the first place.

The D.C. Circuit's suggestion that WMATA might have a legitimate policy rationale for withholding "unreliable or mistaken reports," App. 15a, simply assumes the *merits* of the issue, *i.e.*, that the information concealed from KiSKA and the other bidders was not material. KiSKA's complaint, however, specifically challenges WMATA's decision to withhold *material* information in its possession relating to the difficulty of performing the 14th Street tunneling project, and that information that turned out to be entirely accurate. App. 44a-61a, 63a-68a. The D.C. Circuit recognized that its decision gave WMATA *carte blanche* to withhold material information from bidders, but asserted that WMATA could be trusted to police itself in this regard, because if the agency withheld "all unfavorable information from contractors; ... [it] might soon find few firms willing to submit bids on its projects." App. 15a. Nothing in the WMATA Compact, however, remotely supports this Hobbesian view of the bidding process. Because neither the Compact nor any policy rationale remotely justifies the withholding of material information from bidders, the D.C. Circuit erred by affirming the dismissal of KiSKA's tort claims for failure to state a claim on which relief can be granted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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